

FEDERAL MAGISTRATES COURT OF AUSTRALIA

LE & ORS v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 427

MIGRATION – Partner visa – Migration Review Tribunal – whether compliance with s.360 of Migration Act – continuing obligation to complete hearing – hearing offer should be genuine – applicants to be given opportunity to give evidence and present arguments – interpreter absent before Tribunal concluded hearing and before dealing with all witnesses – offer of resumed hearing not made whilst interpreter present at hearing – concessions by agent made in absence of interpreter – agent’s conduct obsequious – whether breach of s.360 – whether breach of s.359 and 363 of Migration Act – whether failure to make further enquiries unreasonable – whether jurisdictional error – whether apprehended bias – whether failure to have regard to relevant material – validity of Regulation 1.15A of Migration Regulations.

Migration Act 1958, ss.359, 360, 363, 425,
Migration Regulations 1994 (Cth)
Marriage Act 1961

SAAP v Minister for Immigration & Multicultural & Indigenous Affairs (2005)
215 ALR 162
Minister for Immigration & Multicultural & Indigenous Affairs v Scar (2003)
128 FCR 553
Hong v Minister for Immigration & Multicultural & Indigenous Affairs [2004]
FCAFC 1308 (12 October 2004)
Rahman v Minister for Immigration & Multicultural Affairs [2000] FCA 1277
(8 September 2000)
Minister for Immigration & Multicultural & Indigenous Affairs v SGLB [2004]
HCA 32; 207 ALR 12
Mohammed v Minister for Immigration & Multicultural & Indigenous Affairs
[2005] FCAFC 47 (8 April 2005)
Prasad v Minister for Immigration & Ethnic Affairs [1985] 6 FCR 155
Minister for Immigration & Multicultural & Indigenous Affairs v Lay Lat
[2006] FCAFC 61
*SZCIJ v Minister for Immigration & Multicultural & Indigenous Affairs &
Anor* [2006] FCAFC 62
Re Refugee Review Tribunal v Ex Parte H (2001) 179 ALR 425
Minister for Immigration & Multicultural Affairs Re: Ex Parte Epeabaka
(2001) 206 CLR 128
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
Zhang v Minister for Immigration & Multicultural Affairs [2005] FCAFC 30

Minister for Immigration & Multicultural Affairs v SZFDE [2006] FCAFC 142

First Applicant: THI EM NHO LE

Second Applicant: THUY LINH VO

Third Applicant: DHUY ANH KHOA VO

Fourth Applicant: LE KIM LOAN VO

First Respondent: MINISTER FOR IMMIGRATION &
CITIZENSHIP

Second Respondent: MIGRATION REVIEW TRIBUNAL

File number: MLG 738 of 2006

Judgment of: McInnis FM

Hearing date: 2 November 2006

Delivered at: Melbourne

Delivered on: 30 March 2007

REPRESENTATION

Counsel for the Applicants: Mr A. Krohn

Solicitors for the Applicants: Erskine Rodan & Associates

Counsel for the First
Respondent: Mr E. Heerey

Solicitors for the First
Respondent: Clayton Utz

ORDERS

- (1) A writ of certiorari issue directed to the Second Respondent, quashing the decision of the Second Respondent dated 1 May 2006.

- (2) A writ of mandamus issue directed to the Second Respondent, requiring the Second Respondent to determine according to law the application for review.
- (3) The First Respondent shall pay the Applicants' costs fixed in the sum of \$5,000.00.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MLG 738 of 2006

THI EM NHO LE
First Applicant

THUY LINH VO
Second Applicant

DHUY ANH KHOA VO
Third Applicant

LE KIM LOAN VO
Fourth Applicant
And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application seeking judicial review of a decision of the Migration Review Tribunal (the Tribunal) which had affirmed a decision of a delegate of the First Respondent. The decision of the delegate was not to grant a partner (temporary) (class UK) visa to the Applicants.

2. The background in this matter is not in dispute. The Applicants are non-citizens of Australia and nationals of Vietnam. The First Applicant is the mother of the remaining Applicants. On 10 August 2002 the Applicants arrived in Australia on the basis of the First Applicant holding a subclass 300 prospective spouse visa.
3. On 11 August 2002 the First Applicant married an Australian citizen, Mr Xuan Jin Nguyen (the nominator). The nominator was born in Vietnam on 6 October 1936, though was granted Australian citizenship on 24 September 1986.
4. On 10 September 2002 the Applicants applied to the First Respondent for the grant of (temporary) (class UK) visas subclass 820 spouse visas (the visas).
5. On 18 August 2004, officers of the Minister's Department attended the address of the nominator and the Applicants in the suburb of Ardeer. No notice was given of the visit to the nominator, the Applicants or their migration agent and they were not at the premises. It is interesting to note that the delegate of the First Respondent was one of the officers who attended the address on 18 August 2004 (Court Book p.53).
6. On 23 August 2004, the delegate of the Minister interviewed the First Applicant and the nominator. The interview was conducted over a period of approximately five hours. At the interview, the nominator signed a statement withdrawing his sponsorship of the visa application and then retracted that withdrawal.
7. It is relevant to note the delegate's reference to that part of the interview as follows:

“During the course of the interview, as there were obvious numerous inconsistencies in their answers, the sponsor became lost patience. Finally, by his own admission, the sponsor stated that he had not been in a relationship with the applicant for some time. When the sponsor was questioned as to how long that they had not been living together, the sponsor admitted that they had not lived together for at least more than 12 months ago or could be longer. The sponsor then formally advised the department in writing that he wished to withdraw his nomination.

After receiving the sponsor's withdrawal statement, the applicant was invited to return to the interview room and advised about the sponsor's decision. The applicant became furious and agitated. She demanded the sponsor to immediately withdraw his withdrawal statement and advised that she preferred to receive a refusal letter rather than to agree with the sponsor withdrawing the application. Upon seeing the applicant's angry state and her threatening voice when she asked him to withdraw his withdrawal statement, the sponsor, appeared to be under the pressure of the applicant, changed his mind and said he would like to reinstate his support for the Applicant's spousal application. Without providing any reasons, at the end of the interview, the applicant again confirmed she did not want to withdraw her visa application and that she agreed for her application to be refused so that she would seek the review of her spousal application through the Tribunal process. (sic)"

(Court Book p.53)

8. The written withdrawal of sponsorship was purportedly translated for the delegate by a qualified translator. The Vietnamese version and English version both appear in the Supplementary Court Book (p.42). It is important to note that the English version then translated and available to the delegate provides the following, omitting formal details, concerning the nominator:

"After over one year living together as husband and wife because of my medical condition I became impotent, the relationship was stopped.

I am now withdrawn (sic) the sponsorship to Mrs LE thi EM NHO."

9. (Supplementary Court Book p.42)

10. The document is dated 23 August 2004 and there is no dispute that the Vietnamese version of that document and signature is in the handwriting of the nominator.
11. As noted earlier the First Applicant and the nominator were married on 11 August 2002. The interview with the delegate therefore occurred almost two years after the date of marriage. Hence, the content of the purported withdrawal of sponsorship by the nominator is significant. It was the subject of questioning of the nominator by the Tribunal, and relevant extracts appear in the transcript as follows:

“MS GRAHAM: Mr Nguyen, I have no reason to think that the department officers would lie about a conversation with you, and I also have a letter that you signed, withdrawing your sponsorship for your wife which tells me that you did say those things to the department.

INTERPRETER: Yes, could I explain this, Ms Graham. I was interviewed on 23 August by the department, so five days after they came to my house, and during the interview I lost my control because it was a five-hour interview and I didn't have any break, I didn't have anything to eat and drink. So I lost my control in such a way that I didn't know what I was saying or what I was writing.

MS GRAHAM: Why did you just tell me before that you didn't say those things but now you're saying there was a reason why you said them?

INTERPRETER: I never said that I have never lived with my family.

MS GRAHAM: Why are you telling me now that you lost control and didn't know what you are saying?

INTERPRETER: While I was interviewed, when it came to the third hour of the interview I couldn't concentrate any more and I didn't even know what letter I was writing. Could I have your permission to say something else?

MS GRAHAM: Of course.

INTERPRETER: I was very puzzled after three hours and I didn't know what I was writing in the letter. So a few days after that my solicitor's office told me about the letter and I realised that I just - at that time I just wanted to write that I had to be away from my wife just because of some sexual problems and I was just hoping that I could fix the problem, and at that time I hoped that the department would accept it as a reason, but I didn't expect that they would reject our application because of that letter. Could I continue, please?

MS GRAHAM: Yes.

INTERPRETER: And that letter I wrote just because I was thinking that I was sick and I was puzzled and I was unconfident because of the sexual weakness, and when I wrote that I was hoping that the department would reconsider our application and allow us to be together, but I didn't think that that letter would make the department reject our application.

MS GRAHAM: The English translation of that letter, Mr Nguyen, says that, "Because of my medical condition I became impotent and the relationship was stopped." What the letter says is that the relationship stopped about one year after the marriage.

INTERPRETER If it is the case, then, Ms Graham, could you please get someone else to translate my letter more correctly."

12. (Supplementary Court Book p.35 lines 31-43 to p.36 lines 1-43)

13. The suggestion that the interpreter at the Tribunal translate the document met with some resistance, with the interpreter indicating to the Tribunal that "translation is a different job". In any event, the following relevantly appears in the transcript,

"INTERPRETER: "After having lived together for one year since we signed the marriage certificate, due to some medical conditions I became impotent so we couldn't be close as husband and wife. Now I'd like to withdraw the sponsorship for Ms Le Thi Em Nho."

MS GRAHAM: Thank you, won't be long. I'll put you out of your misery in just a few minutes. We're not going to get through all your witnesses today I'm afraid.

Okay, Mr Nguyen, the interpreter says the letter is a little bit different from what I thought. The letter says that after you had been living together a year you couldn't be close as husband and wife because of your medical problem, and that is quite different from saying that the relationship was finished or stopped. But in your letter you still wrote that you wanted to withdraw your sponsorship. There is no confusion in the translation about that. Can you explain to me why you wrote that letter saying you wanted to withdraw your sponsorship?"

(Supplementary Court Book p.37 lines 24-40)

14. It is clear that there has been a fundamental error in the translation provided to the delegate during the course of the interview when the alleged withdrawal letter was first tendered. For convenience I set out both versions. Version 1 is the translation provided to the delegate, and Version 2 is the version set out in the extract from the Tribunal.

Version 1

“After over one year living together as husband and wife, because of my medical condition I became impotent. The relationship was stopped.”

Version 2

“After having lived together for one year since we signed the marriage certificate, due to some medical conditions I became impotent so we couldn't be close as husband and wife.”

15. Version 2 does not state that “the relationship was stopped”. The Tribunal was clearly aware that Version 1 contained the phrase “the relationship was stopped” as revealed in the extract from the transcript in paragraph 7 of this judgment. Later, however, the Tribunal became aware of the difference in the versions of the letter and as noted in the extracts from the transcript in paragraph 11 of this judgment correctly referred to version 2 and stated, “And that is quite different from saying that the relationship was finished or stopped”. The Tribunal then goes on to say having regard to version 2 that the letter was still written indicating that the sponsor wanted to withdraw sponsorship and said, “There is no confusion in the translation about that”.
16. At the hearing conducted by the Tribunal on 7 March 2006, the Applicants were represented by a migration agent claimed to be instructed by a firm of lawyers. A number of witnesses attended the Tribunal hearing, including three witnesses who were children of the First Applicant and who are the other Applicants in this application.
17. Of the 10 witnesses who attended, only the First Applicant, the nominator, and two friends of the nominator, gave evidence. The hearing before the Tribunal appears to have been scheduled to commence at or about 12.30pm, and appears to have concluded some time between 3.00 and 3.30pm. It is clear that there was some difficulty with the availability of the interpreter. So much is evident from the following exchange:

“MS GRAHAM: We’ve got to 3.30. Are you not available to then?”

MR OLADEJO: It is more yourself and the - - -

MS GRAHAM: Well, it's hard work, but, you know, we've got to get through it. You bring in a cast of thousands, you just have to knuckle down and get through it, but I am concerned about the interpreter because she is constantly working today, and it can be very draining for her. So how about we have a 10 minute break, see what we can get through in the last hour, and if we need to come back you can tell me whether you want to come back later. That will be your call.

MR OLADEJO: I would be most obliged if we can get through everything today - - -

MS GRAHAM: We'll do our best. But I've been in trouble before for rushing witnesses so I'm not going to make that mistake again."

(Supplementary Court Book p.26 lines 41-42 to p.27 lines 1-14)

18. As foreshadowed in that extract, the Tribunal appeared to take a 10 minute break at 2.20pm. It then received evidence from the nominator, an extract of which appears earlier in this judgment. Apart from the material referred to above, the nominator denied telling officers of the Department that he had never lived with his wife and that the marriage was not genuine, and that he had been living with a friend, Mr Huynh (Supplementary Court Book p.35). The following exchange occurred:

"MS GRAHAM: Do you remember telling the officers that you had never lived with your wife, that the marriage wasn't genuine and that you had been living with your friend, Mr Huynh?

INTERPRETER: I can be sure that I have never said something like that.

MS GRAHAM: Mr Nguyen, I have no reason to think that the department officers would lie about a conversation with you, and I also have a letter that you signed, withdrawing your sponsorship for your wife which tells me that you did say those things to the department.

INTERPRETER: Yes, could I explain this, Ms Graham. I was interviewed on 23 August by the department, so five days after they came to my house, and during the interview I lost my control because it was a five-hour interview and I didn't have any break, I didn't have anything to eat and drink. So I lost my control in such a way that I didn't know what I was saying or what I was writing.

MS GRAHAM: Why did you tell me before that you didn't say those things but now you're saying there was a reason why you said them?

INTERPRETER: I never said that I never lived with my family.

MS GRAHAM: Why are you telling me now that you lost control and didn't know what you are saying?

INTERPRETER: While I was interviewed, when it came to the third hour of the interview I couldn't concentrate any more and I didn't even know what letter I was writing. Could I have your permission to say something else?"

19. (Supplementary Court Book p.31 lines 31-44 to p.32 lines 1-15)

20. After that extract there appears the exchange concerning the purported withdrawal letter. It was apparent that the Tribunal became concerned that the interpreter was no longer going to be available for the hearing. The following exchange occurred:

"INTERPRETER: Ms Graham, it was not accidental. It was written while I couldn't control myself, after having pressures during the five-hour interview, and I was continually asked questions by the department officer, and the department also encouraged me to do so so that we could have some other way of sponsoring my family, and I was happy about that, and could I also add something else please?"

MS GRAHAM: Yes, but it will have to be quick because the interpreter will need to finish."

21. (Supplementary Court Book p.38 lines 11-20)

22. The exchange continued as follows:

"INTERPRETER: Yes, this is the last thing I'd like to say, that my family are very happy together. Although I have some sexual problem I still love my wife a lot. Until today my family are very happy together and my children are very good. My wife always encourage me, comfort me and look after me. That's why I have a very close relationship with my wife, and that's why I am able to teach the children and help and support the children. So one of them now have a job and two are very good students.

MS GRAHAM: Just finally, Mr Nguyen, we really have to finish.

INTERPRETER: Finally, I'd like you, Ms Graham, to reconsider our case so that we have a chance to love each other, to be close together, so that we can focus on our family and on bringing up the children, encouraging them to become good citizens in Australia.

MS GRAHAM: Thank you, Mr Nguyen, we've run out of time today. I'm going to discuss this with your agent and then he can let you know later on what he decides to do."

23. (Supplementary Court Book p.38 lines 22-39)

24. The transcript records that after that extract, the interpreter left the hearing room. So much is clear from the following extract:

"INTERPRETER: Yes, I have to go.

MS GRAHAM: All right, off you go. Thank you so much, you've worked very hard today. The interpreter is now leaving the room. Mr Oladejo, I'm going to prepare a fairly detailed 359A letter, it will take a couple of days. You don't want to do any work in the Children's Court because you have to sit down there, too. What's today, Tuesday. It won't be sent out until the end of this week or early next week and once you get that letter it might be a good time then for you to decide whether you want to have another hearing to do the rest of the witnesses. That is entirely your decision, not mine, all right. You have the running of the case, if you want me to - because we've just run out of time today.

MR OLADEJO: I know."

25. (Supplementary Court Book p.39 lines 1-14)

26. Significantly for the present application, the following exchange occurred,

"MS GRAHAM: If you want me to take evidence from those people I will do so at your request. You can either tell me now that you definitely want to do that or you can wait until you get the 359A letter and then make a judgment call at that time.

MR OLADEJO: Ms Graham, I know that the tribunal is very precious. I know this case has been filed more than a year ago, and I do know that there is enough evidence for the tribunal to form its view one way other with regard to the case, and I absolutely give the discretion to the member. The sponsor and the applicant have been interviewed and two interviews have also

given testimony. Even though we have other witnesses I don't feel that there is a compelling need, unless the tribunal thinks otherwise, for them to warrant another hearing. (sic)

MS GRAHAM: That's not my call, that's your call. I'm not going to tell you what my view is of this case because I haven't got a view yet. So you need to be the one who decides, and I'm suggesting that maybe you might do that after you get the 359A letter and see what the issues are.

MR OLADEJO: Okay (indistinct)

MS GRAHAM: Because it will be a quite detailed letter, because we are now obliged to send 359A letters about inconsistencies at the hearing. So it will give you a very clear picture of what the outstanding issues are, bearing in mind that because I haven't formed a view yet, and I still won't have formed a view even when I write that 359A letter, it will include things that won't end up being a problem. I have a legal obligation, as you understand, to put all the adverse information. I don't decide whether it's finally adverse and against your client until the very end. So it's a little bit circuitous there, but I will take a note now that you are not asking for a further hearing to hear from the rest of the witnesses, but it is still open to you to do that.

MR OLADEJO: I appreciate that.

MS GRAHAM: As long as, of course, you let me know in a timely fashion. So when you've had time to digest the 359A letter, if you want a further hearing, then let me know as soon as you can after that."

27. (Supplementary Court Book p.39 lines 16 – 44 to p.40 lines 1-9)

28. The Tribunal then being aware of the migration agent's client's poor level of English then states the following:

"MS GRAHAM: Thank you. Considering your client's poor level of English I don't think there's much purpose in me explaining to her in a moment. I know you've got Vietnamese staff in your firm, so you can arrange to explain what we've discussed with your client when you've got use of some staff to help explain to her. So it's not ideal that we're having a chat that your client is not hearing about, but I know that you will relay that to her. I hope there wasn't anyone coming in here at half past."

29. (Supplementary Court Book p.40 lines 13-19)
30. After that the following occurred:
- “MR OLADEJO: I do apologise for - - -*
- MS GRAHAM: No, look, things happen they way they happen, and some witnesses give very straightforward pithy evidence and some people can't answer a question straight. It's just how it goes. It takes longer for some than others. Bet everybody is as hungry as I am.*
- MR OLADEJO: That's exactly right.”*
31. (Supplementary Court Book p.40 lines 21-28)
32. Perhaps somewhat unfortunately, the Tribunal then towards the end of the hearing states the following,
- “MS GRAHAM: It's bad timing having it at 12.30. The hearing is finished. Go away, everybody.”*
33. (Supplementary Court Book p.40 lines 30-31)
34. Consistent with the extracts from the Tribunal hearing set out above, it is noted that the Tribunal forwarded a letter dated 16 March 2006 to the migration agent of the Applicants pursuant to s.359A of the *Migration Act 1958* (the Migration Act) (Court Book p.262).
35. The s.359A letter raises in significant detail issues of concern to the Tribunal. Specific reference was made to the delegate's interview and the issue concerning whether the First Applicant and the nominator were in a genuine and continuing relationship.
36. The migration agent, by correspondence dated 13 April 2006 addressed to the Tribunal (Court Book p.269), replied to the matters raised by the Tribunal in the s.359A letter. Detailed responses were set out by the migration agent. Specific reference was made to the allegation by the nominator that the withdrawal of sponsorship was written "under pressure from Department officers, who encouraged him to write the letter". In the responding letter the following comment appears,
- “The nominator confirms that the interview was 5 hour long and without a break (and after which they went with Department's*

officers to Mr Nhat's place for another hour or so. He admits whatever he has done was under some pressure occasioned by the totality of his situation and the interviewing process.

He wishes to confirm that he has been living together with his wife and loves her very much."

The Tribunal decision

37. In its decision the Tribunal recited in some detail the evidence in support of the application.

38. The Tribunal made the following significant finding:-

"The Tribunal is not satisfied that the relationship between the parties was genuine and continuing or that they lived together as husband and wife at the time of application. The Tribunal finds, therefore, that the review applicant was not the nominator's spouse at the time of application and she does not satisfy paragraph (2) or (6) of clause 820.211."

39. (Court Book p.290)

40. The relevant paragraphs of clause 820.211 are:-

"820.211

(2) An applicant meets the requirements of this subclause if:

(a) the applicant is the spouse of a person who:

(i) is not prohibited by subclause (2B) from being a sponsoring spouse; and

i. is not prohibited by subclause (2B) from being a sponsoring spouse; and

(c) the applicant is sponsored:

(i) if the applicant's spouse has turned 18 – by the spouse; or

(ii) if the applicant's spouse has not turned 18 – by a parent or guardian of the spouse who:

(A) has turned 18; and

- (B) *is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and*
 - (d) *in the case of an applicant who is not the holder of a substantive visa – either:*
 - (i) *the applicant;*
 - (A) *entered Australia as the holder of a Subclass 995 (Diplomatic) visa or as a special purpose visa holder who at the time of entry met the requirements of subclause (2A); and*
 - (B) *satisfies Schedule 3 criterion 3002; or*
 - (ii) *the applicant satisfies Schedule 3 criterion 3001, 3003 and 3004, unless the Minister is satisfied that there are compelling reasons for not applying those criteria.*
- (6) *An applicant meets the requirements of this subclause if the applicant:*
 - (a) *is the holder of a Subclass 300 (Prospective Marriage) visa; and*
 - (b) *has married the sponsoring spouse under a marriage that is recognised as valid for the purposes of the Act; and*
 - (c) *the applicant is sponsored:*
 - (i) *if the applicant's spouse has turned 18 – by the spouse; or*
 - (ii) *if the applicant's spouse has not turned 18 – by a parent or guardian of the spouse who:*
 - (A) *has turned 18; and*
 - (B) *is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and*
 - (d) *continues to be the spouse of the sponsoring spouse.*
- (7) *An applicant meets the requirements of this subclause if:*

- (a) *the applicant is the holder of a Subclass 300 (Prospective Marriage) visa; and*
 - (b) *the applicant has married the sponsoring spouse under a marriage that is recognised as valid for the purposes of the Act; and*
 - (c) *the sponsoring spouse has died; and*
 - (d) *the applicant satisfies the Minister that the applicant would have continued to be the spouse of the sponsoring spouse if the sponsoring spouse had not died; and*
 - (e) *the applicant has developed close business, cultural or personal ties in Australia.*
- (8) *An applicant meets the requirements of this subclause if:*
- (a) *the applicant is the holder of a Subclass 300 (Prospective Marriage) visa; and*
 - (b) *the applicant has married the sponsoring spouse under a marriage that is recognised as valid for the purposes of the Act; and*
 - (c) *the relationship between the applicant and the sponsoring spouse has ceased; and*
 - (d) *any 1 or more of the following:*
 - (i) *the applicant;*
 - (ii) *a member of the family unit of the applicant who has made a combined application with the applicant;*
 - (iii) *a dependent child of the sponsoring spouse or of the applicant or of both of them;**has suffered domestic violence committed by the sponsoring spouse.”*

41. In reaching its decision the Tribunal noted that paragraphs [7] and [8] of clause 820.211 do not apply as the nominator is not deceased and there is no evidence that the parties relationship had deceased because of domestic violence.

42. The Tribunal directed its attention to the question of whether the Applicant was the spouse of the sponsor at the time of the application and whether she continued to be his spouse at the time of the Tribunal decision.

43. The Tribunal referred to Regulation 1.15A of the Regulations and stated,

“Regulation 1.15A of the Regulations defines the term spouse In the case of both married and de facto relationships, the decision maker must be satisfied that there is a mutual commitment to a shared life as husband and wife to the exclusion of all others, that the relationship is genuine and continuing, and that the couple live together, or do not live separately and apart on a permanent basis. In forming an opinion whether a married or de facto relationship exists, the Tribunal must have regard to all the circumstances of the relationship, including in particular the considerations set out in regulation 1.15A(3). These considerations relate to the financial aspects, the nature of the household, the social aspects and the nature of the persons’ commitment to each other. The fact that two persons have lived together for a period of 6 months or more is to be taken as strong evidence of a genuine and continuing relationship, but a relationship of a shorter duration cannot be taken not to be genuine and continuing only for that reason.

In determining whether one person is the spouse of another, the Tribunal may have regard to evidence of subsequent history as an aid to determine facts at an earlier point in time, where that subsequent history tends logically to show the existence or non existence of those facts: Bretag v MILGEA (unreported, Federal Court of Australia, O’Loughlin J, 29 November 1991).”

44. (Court Book p.288)

45. In its decision the Tribunal dealt with the financial aspects of the relationship, the nature of the household, the social aspects of the relationship, the nature of the persons’ commitment to each, other mutual commitment to a shared life to the exclusion of all others and what it described as “other relevant considerations”.

46. In considering the financial aspects of the relationship the Tribunal made a significant finding that there is “little evidence that the parties

combined their financial affairs during the first two years of marriage”. (Court Book p.289).

47. When considering the nature of the household the Tribunal referred to the provision of what it describes as joint utility accounts and joint rent receipts for an address in Sunshine for the period December 2004 to February 2006 and then notes, *“No evidence of joint payment of utilities or rent was provided in relation to the parties’ address in ... Ardeer”*.

48. The Tribunal then proceeded to consider the social aspects of the relationship yet noted the provision of statutory declarations provided by the Applicant from her sister and friend in Australia together with translated letters to the parties from friends and family in Vietnam and photograph albums provided of the Applicant. The Tribunal then significantly states,

49. *“The review applicant’s three children were present at the Tribunal hearing but did not have time to give evidence. The review applicant’s migration agent was advised that a further hearing could be arranged if required. No request for a further hearing was received by the Tribunal.”*

50. (Court Book p.289)

51. In its findings concerning “other relevant considerations” the Tribunal relevantly states,

“At his interview with the Department on 23 August 2004 the nominator indicated that he had never lived with the review applicant, that he had provided false information in support of the application at the request of the review applicant and her sister, and that he wished to withdraw his sponsorship. The nominator repeatedly denied making these comments at his interview, and stated that he was pressured by Department officers to sign a letter withdrawing his sponsorship on the understanding that he would be assisting the review applicant by doing so. Both parties claimed that the nominator was under great stress at the time of the interview because he had been without food and drink for five hours and because he was old and sick and could not cope with the interview process.

The Tribunal takes into account that the nominator is a person who was aged 67 years at the time of interview, and accepts that he may have been distressed and confused by the interview process. However, the Tribunal does not accept that Department officers would have fabricated his admissions or pressured him into formally withdrawing his sponsorship if it was not his intent to do so. The Tribunal notes that the nominator showed officers his clothing in a wardrobe and on the clothes line at his friend's address in Footscray, and that he confirmed that he lived at this address with Mr Huynh.

The Tribunal notes the numerous inconsistencies between the parties' accounts of particular events, including the development of the relationship, the nominator's proposal of marriage, the reasons for the nominator's travel to Vietnam after the marriage and the parties' activities on the day of the Department's visit on 18 August 2004. The Tribunal notes that there is a 29 year age difference between the parties. The Tribunal gives some weight to the nominator's age and takes into account the matters raised in the psychiatric report of 1 November 2005. The Tribunal does not accept, however, that the nominator's age or psychological problems fully explain his apparent inability to accurately recall significant events in his relationship with the review applicant."

52. (Court Book pp.289-290)

53. The Tribunal analysed the claim then decided that it was not satisfied the relationship between the parties was genuine and continuing or that they lived together as husband and wife at the time of the application. Having made the finding that the Applicant failed to satisfy an essential criterion for the grant of the visa the Tribunal then stated that it need not "consider the remaining criteria".

The issues

54. The Applicants relied upon an Amended Application filed on 25 August 2006.
55. The grounds may conveniently be referred to in broad terms as raising the following issues:
- a) whether the Tribunal complied with s.360 of the Migration Act;

- b) whether the Tribunal discharged any obligations it may have had to inquire under ss.359 and 363 of the Migration Act;
- c) whether there has been a denial of procedural fairness and natural justice;
- d) whether the Tribunal conducted itself in a manner giving rise to an apprehension of bias;
- e) whether the Tribunal failed to have regard to relevant material;
- f) whether Regulation 1.15A of the *Migration Regulations 1994* (Commonwealth) (the Regulations) is valid.

(a) Whether the Tribunal complied with s.360 of the Migration Act;

56. Section 360 of the Migration Act relevantly provides as follows:

“(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.”

Applicants’ submissions

- 57. The Applicant submitted the Tribunal had a continuing obligation to invite the Applicant to appear before it to give evidence and present arguments relating to issues arising on the review.
- 58. It was noted that after conducting a hearing on 7 March 2006 the Tribunal then forwarded a letter dated 16 March 2006 pursuant to s.359A of the Migration Act (Court Book p.262). In the s.359A letter addressed to the Applicant’s agent the Tribunal referred to a number of inconsistencies directed to the genuineness of the marriage and what might be generally described as issues of credit.
- 59. The Applicant’s migration agent replied by a letter dated 13 April 2006 (Court Book pp.269-274). The reply dealt with the issues raised by the Tribunal.
- 60. The Applicant submitted that in the Tribunal’s decision it is clear that after the Tribunal had received the reply from the migration agent that

there were still critical issues concerning the credit of the Applicant and her sponsor and the genuineness of the marriage and in particular issues arising out:

- (i) *the beginning of the relationship between the first applicant and her sponsor (Decision, page 11.2 CB 290.2)*
- (ii) *a home visit by officers of the first respondent's Department (Decision, page 11.2, CN 290.2)*
- (iii) *the alleged admissions and withdrawal of sponsorship by the first applicant's sponsor (Decision, pages 10.9, 11.6; CB 289.9, 290.6) and*
- (iv) *the travel to Vietnam by the sponsor along in 2002, 2003 and 2004 (Decision, page 11.4, CB 290.4).*

61. It was submitted that after the Tribunal had received the migration agent's response to the s.359A letter that applying s.360(1) of the Migration Act the Tribunal then had a continuing obligation to invite the Applicants to a hearing to deal with the outstanding issues identified by the Applicant given that the hearing on 7 March 2006 was not long enough to take evidence from all witnesses brought by the Applicants. Reference was made to the transcript which appears earlier in this judgment at [17-18] and extracts from the transcript set out at [20-23] above.
62. It was accepted by the Applicant that the Tribunal raised the relevant issues at the hearing on 7 March 2006 and put particulars of that information in the s.359A letter and also invited the migration agent to tell the Tribunal if a further hearing was required. It was submitted however that where there had not been sufficient time for the Tribunal to take all the evidence at the hearing and where issues of credit remained outstanding including consideration of serious allegations concerning the conduct of officers of the First Respondent's Department that the obligation under s.360 of the Migration Act had not been exhausted. The allegations against the officers of the Minister's Department, it was argued, "bore upon the Applicant's credit".
63. Reference was made to the nature of the Tribunal hearing as being inquisitorial and that the obligations under s.360 of the Migration Act

meant that the Tribunal could not displace to the Applicant's migration agent the responsibility of determining whether a further written invitation to an oral hearing would be required. It was argued that just as there is an obligation under s.359A to give particulars of information and to invite comment which continues until the decision on the review is made by the Tribunal (see *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 215 ALR 162) so also does the obligation continue under s.360 of the Migration Act.

First Respondent's submissions

64. The First Respondent submitted that the Tribunal fulfilled its duty under s.360(1) by sending its letter dated 15 February 2006 (Court Book pp.93-94) which invited the Applicants to attend a hearing and by holding that hearing on 7 March 2006.
65. It was submitted that on 16 March 2006 the Tribunal sent a detailed s.359A letter to the Applicant setting a deadline of 13 April 2006 for the provision of further comments by the Applicants. It was noted that no argument is raised as to the adequacy of that letter.
66. Reference was made to the letter dated 13 April 2006 from the Applicant's agent (Court Book pp.269-274). The agent's response it was submitted provided comment on the matters set out in the Tribunal's letter. The Applicants' agent did not request a further hearing though the Court notes in passing that the Tribunal's s.359A letter did not suggest that a further hearing may be possible.
67. The First Respondent submitted that the transcript extract set out in [19] and [20] reveals an explicit offer for a further hearing which was declined. It was submitted that the Tribunal repeatedly told the Applicants' agent that it would hold a further hearing if the Applicants so wished. The agent indicated to the Tribunal at that time that the Applicants did not require any further hearing though the Tribunal insisted that the matter be reconsidered after receipt of the Tribunal's s.359A letter.
68. The First Respondent submitted that in order to establish that the Tribunal has failed to comply with s.360 of the Migration Act the Applicants must show that the Tribunal did not in truth allow them to

give evidence and present arguments relating to those issues or that the invitation to the hearing could be regarded as merely a “hollow shell or empty gesture” (See *Minister for Immigration & Multicultural & Indigenous Affairs v Scar* (2003) 128 FCR 553 at [33] - [41] (Scar) where the Court dealt with s.425(1) of the Migration Act which imposes identical obligations upon the Refugee Review Tribunal comparable to the obligations imposed on the Migration Review Tribunal by s.360(1)).

69. It was argued by the First Respondent that in the present case the visa Applicant and the nominator attended the Tribunal hearing and two other witnesses gave evidence with the Applicant having the benefit of legal representation. The Tribunal explicitly and repeatedly offered the Applicant the further hearing but the offer was declined. Accordingly it was argued it is artificial to suggest that the Tribunal’s invitation to a further hearing could be regarded as a “hollow shell or empty gesture”. The Tribunal otherwise did not allow the Applicant to give evidence and present arguments.
70. It was submitted that the Tribunal fully complied with the requirements of s.360(1) by inviting the Applicants to the hearing which occurred on 7 March 2006 and in relation to any further hearing the Applicants through their agent had consented to the Tribunal deciding the review without again appearing before it. Hence, it was submitted no further duty applied to the Tribunal under s.360(1). It was submitted this ground is without substance.

Reasoning

71. In my view the transcript set out earlier in this judgment reveals some unfortunate comments by the Tribunal including the following,

“... Its hard work, but, you know we’ve got to get through it. You bring in a cast of thousands. You just have to knuckle down and get through it ...”

...

“But I’ve been in trouble before for rushing witnesses so I am not going to make that mistake again.”

...

“We’ve run out of time today”

...

“Things happen the way they happen and some witnesses give very straight forward pithy evidence and some people can’t answer a question straight. Its just how it goes. It takes longer for some than others. Bet everybody is as hungry as I am

The hearing is finished. Go away everybody”.

72. In fairness those comments should be read in my view in context and having regard to other comments made by the Tribunal which in my view are of significance, namely,

“We are not going to get through all your witnesses today I’m afraid.”

“So how about we have a ten minute break, see what we can get through in the last hour, and if we need to come back you can tell me whether you want to come back later. That will be your call.”

“... We’ve run out of time today. I’m going to discuss this with your agent and then can let you know later on what he decides to do.”

“It (the s.359A letter) wont be sent out until the end of this week or early next week and once you get that letter it might be a good time then for you to decide whether you want to have another hearing to do the rest of the witnesses. That is entirely your decision not mine alright. You have the running of the case if you want me to – because we’ve just run out of time today”

73. In relation to the last comment the representative of the Applicants replied, *“I know”*. Further, it should be noted that the reference by the Tribunal not wishing to make the mistake of rushing witnesses was preceded by the comment from the Applicants’ agent that he would *“be most obliged if we can get through everything today”*.

74. Perhaps of more significance is the extract in paragraph 20 of this judgment where the Tribunal states,

“If you want me to take evidence from those people I will do so at your request. You can either tell me now that you definitely want

to do that or you can wait until you get the s.359A letter and then make a judgment call at that time.”

75. The Applicants’ agent then as indicated in the transcript appearing earlier in this judgment responds by saying in part,

“Even though we have other witnesses I don’t feel that there is a compelling need, unless the Tribunal thinks otherwise for them to warrant another hearing”.

76. Significantly again the Tribunal responds,

“That’s not my call, that’s your call. I’m not going to tell you what my view is of the case because I haven’t got a view yet. So you need to be the one who decides and I am suggesting that may be you might do that after you get the s.359A letter and see what the issues are.”

77. I am satisfied that where a hearing has not concluded in the sense that witnesses available have not given evidence that there is a continuing obligation on the part of the Tribunal to ensure that the invitation to the hearing remains genuine and is not simply a hollow or empty gesture.

78. The s.359A letter should be considered in the context of the reference to that letter by the Tribunal at the hearing. A reference was made to the letter in the context of the Tribunal quite properly suggesting that it was going to prepare a “fairly detailed s.359A letter” and then again quite properly stating that once the letter was received by the agent then “it might be a good time then for you to decide whether you want to have another hearing to do the rest of the witnesses”. It is clear that the Tribunal then refers to that as being “entirely your decision, not mine ... you have the running of the case ...”. Unfortunately that exchange occurred after the interpreter had left the hearing room. Accordingly, although the comments were directed to the agent the fact remains that it is not the agent’s preference but rather the client of the agent that matters.

79. If an opportunity has been given during the hearing for a further hearing to occur then that opportunity should be conveyed through and interpreter to the Applicant. Failure to do so in my view renders the process which occurred after the interpreter left the hearing room as meaningless. There is no evidence that the Tribunal arranged for its

transcript to be made available to the Applicant or that it sought any assurance that what had been said at the Tribunal hearing would be interpreted. Instead the Tribunal relies on knowledge that the agent apparently had “Vietnamese staff” and that the agent could “arrange to explain what we have discussed with your client when you’ve got use of some staff to help explain to her”.

80. The Tribunal itself clearly had significant reservations about the process because it then states, “So it’s not ideal that we are having a chat that your client is not hearing about, but I know that you will relay that to her”. It is not clear what was to be relayed. It is equally not clear that the agent took comprehensive notes of the precise words uttered by the Tribunal. The key words uttered by the Tribunal relate to the desirability of reconsidering the question of recalling witnesses after receipt of the s.359A letter.
81. It is further significant that in the absence of the interpreter the Applicant’s agent made significant concessions which appear in the extract of transcript in paragraph 20 of this judgment. Those concessions include acknowledging that the application had been “filed more than a year ago” together with a statement “I do know that there is enough evidence for the Tribunal to form its view one way other (sic) with regard to the case, and I absolutely give the discretion to the member”. A number of observations need to be made about that concession. The first is that the agent without knowing the content of the s.359A letter has already made a concession that there is enough evidence for the Tribunal to form its view one way or another. Further the agent in any event has given absolutely the discretion to the member and has not been too willing to accept responsibility for and on behalf of its client. The agent then inexplicably goes on to state, “Even though we have other witnesses I don’t feel that there is a compelling need, unless the Tribunal thinks otherwise for them to warrant another hearing”. This extraordinary concession was made against the backdrop of a major dispute concerning both the content of a written withdrawal and the circumstances in which it was produced, namely a complaint that it was produced after five hours of interview without any break or the provision of any refreshments.

82. The agent, in my view, seemed to adopt what could only be described as a somewhat obsequious approach to the proceedings. This is revealed in the extract of transcript which appears in paragraph 15 of the judgment where after the Tribunal refers to “a cast of thousands” the agent states, “I would be most obliged if we can get through everything today”. That may have been the preference of the agent but it is not revealed in the transcript that that was the preference of the Applicant. Even though that exchange occurred in the presence of an interpreter in my view the agent’s approach appears to be more concerned about the agent’s personal preference rather than the interests of the client. The negligence of the agents in pursuing the right to call further witnesses who had already attended the Tribunal should not be visited against the Applicant who retains the right to have a genuine hearing which is more than a mere empty gesture. It is clear that there were strict limitations on time recognised by the Tribunal which unfortunately arose due to the unavailability of the interpreter. It is of course of more significance that what occurred after the interpreter left the Tribunal involved a significant invitation by the Tribunal. There is simply no evidence to suggest that the clear invitation properly referred to by the Tribunal was ever passed on in detail to the Applicant. It would be wrong for the Court to assume that it occurred given that approximately two pages of transcript record the exchange which occurred after the interpreter had left the Tribunal hearing. The exchange between the agent and the Tribunal in the absence of the interpreter in my view was critical. Without the offer being accurately and contemporaneously interpreted the conclusion I reach is that offer of a further hearing upon receipt of the s.359A letter could not properly be interpreted as a genuine offer and the ongoing obligation of the Tribunal to ensure that its original invitation to hearing is valid.
83. In my view compliance with s.360 of the Migration Act continues where the hearing, for reasons beyond the control of the Tribunal, is interrupted. In this case no criticism is made of the Tribunal for at least continuing an exchange with the agent in the absence of the interpreter as no doubt that was thought to be a practical way of dealing with the matter. It is however relevant to note that the Tribunal itself clearly expressed discomfort with the process when she stated, “So its not ideal that we are having a chat that your client is not hearing about ...”

The mere fact that the Tribunal obtained some comfort by expressing a knowledge that the agent would “relay that to her” does not indicate that all had been said would be relayed accurately to the Applicant. It is the Applicant’s rights to a hearing not the convenience of the agent which is of paramount concern for a Tribunal in discharging its duties and obligations under s.360 of the Migration Act.

84. I should add that other extracts set out earlier in this judgment further reveal what I have described as the obsequious nature of the representation by the agent. In particular I note the comment by the agent who states, “I know that the Tribunal is very precious”. That comment along with what can only be described as uninformed acquiescence had significant detrimental impact upon the Applicant’s rights to a genuine hearing.
85. Further and in the alternative even if I am wrong in relation to the conduct of the agent, it is clear that the agent at least sought to cast the onus back upon the Tribunal by saying, “unless the Tribunal thinks otherwise”. It is also clear that in the absence of the interpreter that the agent just prior to that comment stated, “I absolutely give the discretion to the member”. Hence, I accept the submission by the Applicant that the Tribunal cannot displace its obligations under s.360 of the Migration Act which are continuing where a hearing is not concluded to the Applicant or the agent.
86. The Tribunal in this case had clear evidence of circumstances which at the very least would bring into question the voluntariness of the withdrawal of sponsorship document. It also had clear evidence that the document had not been accurately translated. Curiously the Tribunal stated without evidence from any departmental officer that it had “no reason to think the department officers would lie about a conversation with you ...” It drew that conclusion by reference to the letter that was signed albeit it incorrectly translated at one point and then stated that that letter “tells me that you did say those things to the department”.
87. At the very least the other evidence of the witnesses available to the called but not called due to the absence of the interpreter may have provided the Tribunal with other evidence in the absence of the departmental officers which would make it less likely for the Tribunal

to rely upon the written document obtained on the Applicant's allegations after a five hour interview without a break and without refreshment.

88. The obligations imposed upon a Tribunal under s.360 should not be narrowly confined to an invitation to appear but also to "give evidence and present arguments relating to the issues arising in relation to the decision under review". It is the invitation to give evidence and present arguments that is crucial. The giving of evidence is not confined simply to the Applicant but extends to those witnesses whom the Applicant has evinced an intention to call. It is not appropriate for the Tribunal to simply seek to transfer the obligations it has under s.360 to the Applicant's agent. In the present case it is particularly inappropriate to extend the further invitation in the absence of an interpreter when the Tribunal cannot be satisfied that the extension of that invitation has been accurately interpreted and communicated to an Applicant.
89. In my view for the reasons given the obligations of the Tribunal pursuant to s.360 of the Migration Act have not been discharged and accordingly that is a sufficient basis upon which the application should be allowed.

(b) Whether the Tribunal discharged any obligations it may have had to inquire under ss.359 and 363 of the Migration Act

Applicants' submissions

90. The Applicants submitted that the Tribunal had power under ss.359 and 363 of the Migration Act to make enquiries or to cause the secretary of the Minister's Department to make enquiries. Those sections are as follows:-

"359(1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.

(2) Without limiting subsection (1), the Tribunal may invite a person to give additional information.

(3) If an invitation is given to a person other than the Secretary, the invitation must be given:

(a) except where paragraph (b) applies--by one of the methods specified in section 379A; or

(b) if the invitation is given to a person in immigration detention--by a method prescribed for the purposes of giving documents to such a person.

(4) If an invitation is given to the Secretary, the invitation must be given by one of the methods specified in section 379B.

...

363(1) For the purpose of the review of a decision, the Tribunal may:

(a) take evidence on oath or affirmation;

(b) adjourn the review from time to time;

(c) subject to sections 377 and 378, give information to the applicant and to the Secretary; or

(d) require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination.

(2) The Tribunal may combine the reviews of 2 or more reviewable decisions made in respect of the same person.

(3) Subject to subsection (4), the presiding member in relation to a review may:

(a) summon a person to appear before the Tribunal to give evidence;

(b) summon a person to produce to the Tribunal such documents as are referred to in the summons;

(c) require a person appearing before the Tribunal to give evidence either to take an oath or to make an affirmation; and

(d) administer an oath or affirmation to a person so appearing.

(4) The presiding member shall not, for the purposes of a review that is being conducted in Australia, summon a person under paragraph (3)(a) or (b) unless the person is in Australia.

(5) The oath or affirmation to be taken or made by a person for the purposes of this section is an oath or affirmation that the evidence that the person will give will be true.”

91. It was submitted that the Tribunal had power to get information or to make or direct enquires into the conduct of the Minister’s officers at the interview which was the subject of significant allegations by the First Applicant and her husband. If accepted, those allegations may have changed the Tribunal’s decision.

92. In written submissions it appears the Applicants acknowledge that it is for the Tribunal to determine whether to exercise the powers in a particular case. Reference was made to decision of Finn J in *Hong v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 1308 (12 October 2004) at [40] as follows,

“40. ... The function of the Tribunal is inquisitorial not adversarial. It is ‘an inquisitor obliged to be fair’: Re Ruddock; Ex parte Applicant S154/2002 at [57]. It can require the departmental Secretary to make an investigation it thinks necessary with respect to the review and to report to the Tribunal: s 363(1)(d) of the Act; but it is a matter for the Tribunal whether this power should be exercised in a particular case: WAIJ v Minister for Immigration & Multicultural Affairs [2004] FCAFC 74 at [16].”

93. Reference was made to the decision of French J in *Rahman v Minister for Immigration & Multicultural Affairs* [2000] FCA 1277 (8 September 2000) at [29] – [31]. As I understood it particular emphasis was placed upon that decision as authority for the proposition that there may be cases in which “a decision maker who unreasonably fails to ascertain relevant facts known to be readily available will be taken to have exercised a discretion making power improperly”.

94. The Applicants further noted the decision of the High Court in *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB* [2004] HCA 32; 207 ALR 12 where the Court relevantly states at [43] the following:-

“... Secondly, whilst s 427 of the Act confers power on the Tribunal to obtain a medical report, the Act does not impose any duty or obligation to do so. Rather, s 426 provides that, even if an applicant requests that the Tribunal take oral or written evidence from a witness (such as a medical practitioner or psychiatrist), the Tribunal is not required to obtain such evidence. Thus, the Tribunal is under no duty to inquire.”

95. The Applicants referred to a decision of the Full Court of the Federal Court in *Mohammed v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 47 (8 April 2005) at [24] where the Court stated,

“... The Tribunal was under no general duty to enquire. It was entitled to act on the material presented by the appellant ...”

96. The Applicants accepted the proposition that the Tribunal is under no general duty to enquire but rather submitted that there can be circumstances where the ready availability of information possibly critical to review can enliven the power to enquire into a duty to do so. Reference was made to *Prasad v Minister for Immigration & Ethnic Affairs* [1985] 6 FCR 155 (Prasad) where Wilcox J said at p.170,

“It is not enough that the court find that the sounder course would have been to make inquiries. But in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it.”

97. Particular reference was made to the claim that the nominator alleges he was pressured by the Department’s officers *“to sign a letter withdrawing his sponsorship on the understanding that he would be assisting the review applicant by doing so.”* It was argued the Tribunal did not then take simple steps available to test the serious allegations by making enquiries under s.359 or s.363 to obtain evidence from or about the Minister’s officers and their conduct. It was argued the Tribunal had a closed mind to the possibilities that the Minister’s officers could have behaved as alleged. Specific reference was made to the transcript extract set out in [10] of this judgment where the Tribunal

relevantly states, “*I have no reason to think that the Department officers would lie about a conversation with you ...*”

98. It was noted in the Tribunal decision after referring to the option of perhaps making further enquiries that it concluded, “*The Tribunal does not accept the Department’s officers would have fabricated his admissions or pressured him into formally withdrawing his sponsorship if it was not his intent to do so ...*”.
99. It was submitted that in the circumstances the Tribunal failed to seek information and failed to act as required according to law.

First Respondent’s submissions

100. The First Respondent submitted that reliance by the Applicants upon the decision of the Court in *Prasad* referred to obiter of Wilcox J in that case though it was noted that the High Court has subsequently confirmed there may be grounds for judicial review of a Tribunal’s decision on the basis that it was “manifestly unreasonable”, that is so unreasonable that no reasonable person could have come to it (see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 per Mason CJ citing *Wednesbury Corporation* (1948) 1 KB at 230, 233-4 per Lord Greene NR).
101. It was submitted that in the present case the Tribunal had written evidence in the form of the statement signed by the nominator on 23 August 2004 withdrawing his sponsorship of the visa Applicant. It was submitted the Tribunal took into account the repeated denials of the nominator of the comments attributed to him by the Departmental officers and his statement that he was pressured by the officers to sign the withdrawal of sponsorship statement. The First Respondent submitted that it was required to make a factual decision whether to believe the nominator’s written statement or to believe his subsequent explanation as to why the written statement was false. It was argued the Applicants had not identified material which was “obviously available” which would be centrally relevant to the Tribunal’s decision but rather speculate that the Tribunal may have been able to get “evidence from or about the Minister’s officers and their conduct” without a suggestion of the form or content of that evidence. It was

noted that if the evidence was to assist the Applicants it would have required an admission by Departmental officers that they had fabricated evidence. In the circumstances the Tribunal then made a decision which was reasonable and plausible in assuming that it was highly unlikely that the officers would admit fabricating evidence and the assumption was not so unreasonable that no reasonable person could have made it nor could it be said to be devoid of any plausible justification. The ground therefore should fail.

Reasoning

102. In my view the theoretical opportunity for the Tribunal to pursue further enquiries whilst perhaps desirable does not necessarily lead to a conclusion that failure to do so constitutes an error.
103. Whilst the Tribunal may have the opportunity to pursue enquiries from Departmental officers whose conduct has been attacked, it does not mean in every case that a failure to make those enquiries will constitute a breach of ss.359 and 363 of the Migration Act. I accept that there is no general duty to make further enquiries.
104. However, in this instance the Tribunal was able to easily request the attendance of the relevant Departmental officer or officers who conducted the interview which resulted in the withdrawal of sponsorship. It was after all the interview process which was subject to significant challenge and the voluntariness of the withdrawal statement questioned. Whilst the Tribunal was able to assess the subsequent explanation from the nominator as to why the withdrawal document had been signed it should in my view following my reasoning in relation to the previous ground have permitted the Applicant to adduce further evidence in support of the application which may have given greater corroboration to the likelihood or otherwise of the withdrawal having been made voluntarily. It could then assess evidence from relevant Departmental officers. Although the decision of Wilcox J in Prasad appears to be obiter, it is obiter which I am prepared to follow to the extent that in this instance for the Tribunal to proceed to a decision without making any attempt to obtain evidence from the Departmental officers that it conducted itself in a manner which could properly be

described as exercising a decision-making power in a manner so unreasonable that no reasonable person would have so exercised it.

105. By making a finding that it did not accept the Department's officers "would have fabricated his admissions or pressured him into formally withdrawing his sponsorship" the Tribunal was not making an assessment of the facts reasonably open to it. Accordingly this ground succeeds.
106. The Tribunal by seeking further information namely evidence from relevant Departmental officers after completing the hearing of the relevant evidence from the Applicants would have been in a position to determine whether in truth Departmental officers would have fabricated the withdrawal and/or engaged in conduct of a kind leading to the production of what was claimed to be an involuntary withdrawal of sponsorship.

(c) Whether there has been a denial of procedural fairness and natural justice

Applicants' submissions

107. As I understood the submissions in relation to this ground it was sought to be argued that failure to invite the Applicants to attend a further hearing constituted a denial of procedural fairness.
108. The Applicants noted the decision of the Full Court of the Federal Court in *Minister for Immigration & Multicultural & Indigenous Affairs v Lay Lat* [2006] FCAFC 61 (Lay Lat) followed in *SZCIJ v Minister for Immigration & Multicultural & Indigenous Affairs & Anor* [2006] FCAFC 62 (SZCIJ) which it was fairly noted are "on the side of a complete displacement of the common law natural justice hearing rules".

First Respondent's submissions

109. The First Respondent referring to the authorities to which I have referred submitted the Tribunal complied with the relevant provisions

of the Migration Act and accordingly has therefore complied with the rules of natural justice.

Reasoning

110. In my view the ground alone may not succeed as I am satisfied that this Court is bound by the decision of the Full Federal Court in both the *Lay Lat* and *SZCIJ* decision. It is clear to me that by following the decision of the Court in *Lay Lat* a Court constituted by the same Justices on the same day in *SZCIJ* has adopted the reasoning in *Lay Lat* and put beyond doubt the issue of whether this Court is bound by the reasoning in *Lay Lat*. However, I have found for reasons set out earlier that the Tribunal has not complied with its statutory obligations which is sufficient to provide a proper basis upon which the Tribunal decision can be set aside.

111. Nevertheless, as indicated this specific ground should fail.

(d) Whether the Tribunal conducted itself in a manner giving rise to an apprehension of bias

Applicants' submissions

112. The reasonable apprehension of bias relied upon by the Applicants arises in circumstances where it is claimed the Tribunal failed to have regard to the allegations that conduct of the Departmental officers resulted in the written withdrawal of sponsorship. Added to that complaint is the concern regarding the Tribunal's failure to make further enquiries or seek further evidence about those allegations. This it is claimed give rise to a reasonable apprehension and the Tribunal did not approach the review with an open mind.

First Respondent's submissions

113. It was submitted by the First Respondent that the test for apprehended bias is whether a hypothetical fair-minded lay observer who was properly informed as to the nature of the proceedings and that is an issue and the conduct which is said to give rise to an apprehension of

bias might reasonably apprehend that the Tribunal might not be an impartial mind to the resolution of the question to be decided (see *Re Refugee Review Tribunal v Ex Parte H* (2001) 179 ALR 425 at 434, 427 and 434-5 Gleeson CJ, Gaudron and Gummow JJ). The apprehended bias it was submitted requires an objectively real possibility of bias rather than a probability.

114. During the course of submissions the First Respondent referred to the High Court decision in *Minister for Immigration & Multicultural Affairs Re: Ex Parte Epeabaka* (2001) 206 CLR 128 at 158 (Ex Parte Epeabaka) where at [90] Kirby J stated,

“... it must be remembered that the test for disqualification in a case such as the present is not merely a sense of unease or a feeling that conventions of discretion and prudence have been breached. Something more is required. Although the law interposes the imputed consideration of a fair minded observer and speculates on whether that person ‘might’ (rather than ‘would’) entertain a reasonable apprehension of bias in the particular case, the serious consequences that necessarily attend the affirmative conclusion oblige that it should be ‘firmly established’.”

115. The First Respondent submitted that the complaints of apprehended bias in the present case are without any substance as the transcript reveals that the Tribunal had not formed any preliminary view as to whether she did or not believe the nominator’s claims that Departmental officers had fabricated evidence. The Tribunal it was noted repeatedly indicated to the Applicants advisor that it would hold a further hearing and it was the Applicants who declined that opportunity through their advisor.

Reasoning

116. In my view the appropriate test for apprehended bias has been accurately set out in the submissions of the First Respondent. I apply the decision of Kirby J in *Ex Parte Epeabaka*. In my view whilst the Applicants may experience to use Kirby J’s words a “sense of unease” it is clear that something more is required. In the present case for reasons given earlier whilst I am satisfied that the Tribunal has breached its statutory obligations I am not satisfied that that failure is

sufficient to constitute a finding of apprehended bias. Hence, this ground fails.

(e) Whether the Tribunal failed to have regard to relevant material

Applicants' submissions

117. It was submitted that the Tribunal was obliged to consider whether to invite the Applicants and the nominator to a further hearing to deal with the issues referred to earlier in this judgment. That hearing would have then dealt with matters claimed to be made relevant by Regulation 1.15A and in particular the matters of 1.15A(3)(c)(i) and (ii) which relevantly provide,

“Migration Regulation 1.15A

(3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:

...

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;

(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and

...

(d) the nature of the persons' commitment to each other, including:

...

(ii) the length of time during which the persons have lived together; and

...”

118. The Tribunal it was submitted was also obliged to consider whether to make further enquiries. In assessing whether the First Applicant and the sponsor were spouses at the time of the application for visas on the basis of the indicia made relevant by Regulation 1.15A of the Regulations. The Tribunal though recording the dates of marriage and of the application for the visas did not have regard in its findings to the fact that at the date of the application for visas on 11 August 2002 the parties had been married for only one month. It was submitted the duration of the relationship is a relevant consideration pursuant to Regulation 1.15A(3)(d)(ii). A short duration of the marriage it was submitted was an important fact for the Tribunal to consider and to weigh up as patterns in a marriage may well have not have been established so soon after a marriage. A further relevant consideration referred to in submissions was joint responsibility for care and support of children (Regulation 1.15A(3)(b)(i)). The failure to take into account relevant matters is a jurisdictional error.

First Respondent's submissions

119. It was submitted that it cannot be established that the Tribunal has erred by failing to take into account a relevant consideration unless it was a consideration the Tribunal was bound to take into account (see *Peko-Wallsend*. In this case it was submitted the Tribunal having complied with s.360 of the Migration Act regarding any question concerning a second hearing and otherwise complying with ss.359 and 363 regarding additional information that the Tribunal was then not bound to take any further consideration into account in this regard.
120. It was further submitted that the Tribunal in any event has clearly stated in the transcript considered the necessity of holding a second hearing and receiving further evidence and gave the opportunity to the Applicants through their agent and the opportunity was declined. According if considerations were relevant then the Tribunal did not fail to have regard to them.
121. It was further submitted the Tribunal did not ignore the duration of the parties marriage as it clearly recorded the date of marriage and the visa application. The question of whether the Tribunal ought to have placed any particular weight on the fact of the duration of the marriage was

matter for the Tribunal to determine on the merits and is beyond the scope of judicial review.

122. The Tribunal did note the evidence concerning the nominator's friend that the nominator took care of the visa Applicant and her children and that "they all live happily together" and accordingly it was submitted there could not be claimed that the Tribunal ignored this aspect of the Applicants' case. How the Tribunal weighed the factor in its decision is not a matter which would lead to a conclusion that there is jurisdictional error.

Reasoning

123. As indicated earlier in this judgment I have found that the Tribunal has not complied with its obligations pursuant to s.360 of the Migration Act and nor has it otherwise complied as submitted by the Applicants with obligations pursuant to s.359 and 363 of the Migration Act. Accordingly the First Respondent's submissions in relation to this issue are rejected. To that extent this ground succeeds though I should add that it otherwise would fail in relation to the issue concerning duration of marriage and the care of children. In relation to those issues it seems to me the Tribunal has considered them and the real issue now under challenge is the question of weight which in my view does not disclose jurisdictional error.
124. The Tribunal otherwise relevantly considered though perhaps gave little weight to issues concerning the duration of marriage and the care of children. Its consideration of those factors however did not lead the Court to conclude that there has been any jurisdictional error.
125. It follows in my view this ground should fail.

(f) Whether Regulation 1.15A of the *Migration Regulations 1994* (Commonwealth) (the Regulations) is valid

Applicants' submissions

126. The argument advanced for and on behalf of the Applicants in relation to this ground relied upon the meaning of "marriage" in the *Marriage*

Act 1961 meaning the union of man and a woman to the exclusion of all others voluntarily entered into for life. It was claimed that the definition of “spouse” should mean husband or wife and to the extent that Regulation 1.15A purports to add an additional requirement to a valid marriage for the existence of a “spousal relationship” then it is inconsistent with the provisions of the *Marriage Act 1961* and accordingly invalid.

First Respondent’s submissions

127. It was submitted that the Applicants arguments are misconceived. There is no reason according to the First Respondent why the definition of “marriage” in the Marriage Act needs to be the same as the definition of “spouse” under the Migration Regulations or indeed vice versa.
128. It was submitted that Regulation 1.15A was made under the Migration Act the purpose of which is described in the long title of the Act as “an Act relating to the entry into and presence in Australia of aliens of the departure or deportation from Australia of aliens and certain other persons” whereas the Marriage Act simply describes itself as “an act relating to marriage”.
129. The mere fact the definition of “spouse” in Regulation 1.15A overlaps to some extent with the definition of persons in a “marriage” under s.5 of the Marriage Act does not according to the First Respondent’s submissions mean the two definitions must be entirely co-extensive.
130. The fact that the legislature chose two different words to apply in two different legislative contexts indicates according to the First Respondent’s submissions that they are not to be treated as the same.
131. Reference was made to whether Regulation 1.15A was the subject of consideration by Courts at first instance and on appeal (see *Zhang v Minister for Immigration & Multicultural Affairs* [2005] FCAFC 30) and it was submitted that none of those cases ever doubted the validity of the Regulation.

Reasoning

132. In my view Regulation 1.15A is valid. Simply because there is an apparent difference in the definition of “spouse” in that Regulation compared with the definition of “marriage” in the Marriage Act does not of itself render the regulation invalid.
133. I accept the difference in definition arises as a direct consequence of the different intent of the respective legislation. I accept the submissions made for and on behalf of the First Respondent that the purpose of the Migration Act is clearly different to the purpose of the Marriage Act. Accordingly the differences in the definition in the respective legislation does not render Regulation 1.15A to be invalid. It is merely a regulation made pursuant to the Migration Act consistent with the purpose of that Act and not surprisingly has sought to ensure that decision makers look beyond prime facie evidence of a marriage and accordingly refers to other matters which should properly be considered when determining when determining whether indeed parties are in a spousal relationship or that one party is in truth and fact a “spouse” of the other in order to make a proper assessment for the stated purpose of the Migration Act.
134. In my view this ground should fail.

Conclusion

135. In reaching its decision the Court has considered the effect of *Minister for Immigration & Multicultural Affairs v SZFDE* [2006] FCAFC 142. In my view the present case can be distinguished from that case as I have found effectively that by proceeding in the absence of an interpreter to extend a further invitation after the agent had received the s.359A letter the Tribunal could not be regarded as acting in what might be described as a blameless manner. It is that crucial aspect of the proceedings together with the failure to make further enquiries of the Departmental officers which is sufficient to constitute jurisdictional error. The conclusions the Court has reached in this case in my view are not similar to the circumstances arising in SZFDE.
136. It follows for the reasons given that the Application should be allowed and appropriate orders made in favour of the applicants.

**I certify that the preceding one hundred and twenty-one (121) paragraphs
are a true copy of the reasons for judgment of McInnis FM**

Associate:

Date: 30 March 2007